Supreme Court, U. S.
FILED
AUG 1 1979
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

No. 78-1658

BOBBY EUGENE GORDON - - - Petitioner

versus

UNITED STATES OF AMERICA - - Respondent

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES

ALBERT KARNES
2403 Monroe Street
Paducah, Kentucky 42001

JOSEPH S. FREELAND
621 Washington Street
Paducah, Kentucky 42001
Attorneys for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

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BOBBY EUGENE GORDON - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

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May It Please This Honorable Court:

In Respondent's brief they state,

"The facts are not in dispute."

The above is true.

In Respondent's brief it is stated:

> "Petitioner's defense was that he used the guns only for hunting or recreational purposes."

Actually Petitioner's defense was that these unloaded family hunting guns in plain view in his family living room used only for hunting and recreational purposes were not "in commerce or affecting commerce."

The indictment does not allege that they were.

The proof does not show that they were.

For authority that the indictment and proof are sufficient, Respondent cites Scarborough v. United States, 431 U. S. 563, but Respondent does not discuss either the Scarborough indictment or the Scarborough proof.

Why?

Why does Respondent not discuss the Scarborough indictment? Respondent does not tell this Court that the Scarborough indictment charges that "on or about August 1, 1973 . . . Scarborough, having previously been convicted in 1972 of felonies . . . to-wit: possession of a controlled drug with intent to distribute, unlawfully and knowingly did . . . possess *in commerce and affecting commerce* four firearms, that is, [2 revolvers and 2 rifles are described]." (Emphasis ours.) (Appellant's Appendix, U.S. Court of Appeals, p. 23).

Respondent does not discuss the facts of the Scarborough case. Respondent does not tell this Court that Scarborough was engaged in the business of unlawfully trafficking in drugs, that he was conducting his business from his home where he had concealed two pistols and two rifles. They were loaded. Respondent does not tell this Court that in Scarborough there appears to have been no proof that these guns were used for sporting or recreational purposes. Two of them were handguns. Pistols. They were loaded.

The United States position at the trial was that "the mere possession of a firearm by one who has been convicted of a felony is a violation of the laws of the United States" (Court of Appeals, Appendix, p. 32).

The District Court agreed and told the jury at the very beginning of the trial that a person who has been convicted of a felony cannot possess a firearm and that possession of a firearm by one who has been convicted of a felony is a felony under the pertinent sections of the United States Code (Tr.,p. 11, lines 9-14, and Tr., p. 5, lines 19 and 20).

Although the final instructions to the jury were not quite as positive, the Court never rescinded the foregoing statements made to the jury at the very beginning of the trial. In fact from what the Court said at the very beginning of the trial and all the way through the trial it was clear that the Court was of opinion that a person who has been convicted of a felony is prohibited by Federal law from possessing a hunting gun. In sentencing Petitioner the Court said "the Court is aware of the fact that there is a law by Congress which prohibits a felon from being in possession of a firearm" (Court of Appeals, Appendix, p. 53).

We quote the above to emphasize that from the beginning and all the way through, the Court gave no favorable consideration to our position that in order for Petitioner to be guilty it must be alleged and proven that his possession of those guns was in commerce or affecting commerce. That those unloaded hunting guns in plain view in Petitioner's family living room were not in commerce or affecting commerce was our defense.

In Respondent's brief they say that Petitioner cites no authority for his position that the law as interpreted by the District Court and the Court of Appeals is an ex post facto law and that prosecuting Petitioner

as was done in this case constitutes double jeopardy. Respondent is in error. We cite and quote from the United States Constitution.

However, there is no need to question the constitutionality of this law. Petitioner has not violated this law. His possession of these guns was not in commerce or affecting commerce.

Ordinarily hunting guns are not considered as arms, therefore they are not firearms. We quote from Webster's New International Dictionary, 2nd edition, as follows:

> "*Arms* 1. Instrument or weapons of offense or defense; loosely, objects of any kind that may be used as weapons."

It is plain from the above that generally hunting guns used only for hunting or recreational purposes are not considered arms, however, sometimes they are loosely referred to as such.

It is true the Title VII says that the law applies to a shotgun or a rifle. Title IV provides as follows:

> "(3) The term 'firearm' means (A) any weapon . . . or (D) any destructive device . . .
>
> (4) The term 'destructive device' means—
>
> (b) Any type of weapon (other than a shotgun . . .) . . .
>
> the term 'destructive device' shall not include . . . a rifle which the owner intends to use solely for sporting, recreational or cultural purposes."

Construing Title IV and Title VII together so as to give effect to both of them, a fair interpretation is that

this omnibus law applies to shotguns and rifles unless they are intended to be used and are used solely for "sporting, recreational or cultural purposes."

Now Title IV and Title VII are all part of the same law passed by Congress at the same time. We quote from Title IV as follows:

> "Sec. 901.(a) The Congress hereby finds and declares:
>
> . . .
>
> (2) That the ease with which any person can acquire firearms *other than a rifle or a shotgun* (including criminals), is a significant factor in the prevalence of lawlessness and violent crime in the United States;
>
> (3) That only through adequate control over interstate and foreign commerce of these weapons, . . . can this grave problem be properly dealt with, . . .
>
> (4) That the acquisition on a mail order basis of firearms *other than a rifle or a shotgun* by . . . individuals, from a place other than their state of residence, has materially tended to thwart the effectiveness of state laws and regulations . . .
>
> (5) That the sale or other disposition of *concealable* weapons . . . has tended to make ineffective laws, . . . in the several states and local jurisdictions regarding such firearms;
>
> (6) That there is a causal relationship between the easy availability of firearms *other than a rifle or a shotgun,* and . . . criminal behavior . . .
>
> (7) That the United States has become the dumping ground of the castoff surplus military

weapons of other nations, and that such weapons and the large volume of relatively inexpensive *pisols and revolvers (largely worthless for sporting purposes),* imported into the United States in recent years, has contributed greatly to lawlessness.

(8) That the lack of adequate Federal control over interstate and foreign commerce in highly destructive weapons (such as bazookas, mortars, anti-tank guns, and so forth, and destructive devices such as explosive or incendiary grenades, bombs, missiles, and so forth) has allowed such weapons and devices to fall into the hands of lawless persons, . . .

. . .

(b) The Congress further hereby declares that the purpose of this Title is to cope with the conditions referred to in the foregoing subsection, and that it is not the purpose of this Title to place any undue or unnecessary Federal restrictions or burdens on law abiding citizens with respect to the acquisition, possession, or use of firearms '*appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity*' . . ." (Emphasis ours.)

In the United States brief before the Court of Appeals it began as follows:

"Defendant, Appellant Bobby Eugene Gordon was convicted by a jury of two counts of Title 18, U. S. Code, Section 1202(a) App. and Section 922 . . ."

The above is true. The United States charged Petitioner with possession of these guns in violation of Section 1202, but as stated in their brief before the

Court of Appeals they apparently went to part IV (or, Section 922), to allege the interstate commerce connection.

We think the Congress knew what it was doing when it passed this omnibus law. Section 922 made it a violation for a convicted felon to receive a firearm "which had been shipped or transported in interstate or foreign commerce." It specifically exempted shotguns and rifles which the receiver intended to use solely for "sporting, recreational or cultural purposes." Under Title IV a convicted felon receiving a shotgun or rifle which he intended to use solely for sporting, recreational or cultural purposes was not violating this section. If he changed his mind and used the gun for purposes other than sporting, recreational or cultural purposes he still was not violating Title IV. Other than the Court might question his intent at the time he received the guns. However, Title VII took care of this situation. If a convicted felon owned a shotgun or rifle at the time this omnibus law was passed or received one afterwards and if he used these guns in a way that affected interstate commerce, then he was in violation of Title VII. Any other construction would lead to a situation that a convicted felon may receive a shotgun or rifle which has moved in interstate commerce and which he intends to use solely for hunting, sporting or recreational purposes and in receiving it he is not violating any law. However, upon receipt of same, according to the United States interpretation, and according to the interpretation of the District Court and the United States Circuit Court of

Appeals, he would be in immediate violation of Title VII. As we interpret Title VII he would become in violation only if his possession was either in interstate commerce or affecting interstate commerce.

There is no indication that Bobby Eugene Gordon or his family were using these guns in any way which affected interstate commerce.

We are glad that we live in the United States where when we think there has been a gross miscarriage of justice, we can appeal the case all the way to the Supreme Court of the United States.

Respectfully submitted,

JOSEPH S. FREELAND
621 Washington Street
Paducah, Kentucky 42001

ALBERT KARNES
2403 Monroe Street
Paducah, Kentucky 42001

Attorneys for Petitioner